



STATE OF WASHINGTON

STATE BUILDING CODE COUNCIL

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MINUTES

CONFERENCE CALL MEETING STATE BUILDING CODE COUNCIL

Date: December 18, 2009

Monitor Site: Conference Room A, Cherberg Building, Olympia

Council Members Present: Peter DeVries, Chair; Ray Allshouse; John Chelminiak; John Cochran; Angie Homola; Donald Jordan; Robert Koch; Jerry Mueller; Tien Peng; Dale Wentworth; Representative Timm Ormsby; Representative Bruce Dammeier

Council Members Absent: Jon Napier, Vice Chair; Dean Bault; Kristyn Clayton; Tom Kinsman

Visitors Present: Brian Minnich, Eric Lohnes, Julie Johnson, Stan Bowman, Jeanette McKague, Chuck Murray, Dana Quam, Jake Fey

Staff Present: Tim Nogler, Sandra Adix, Krista Braaksma, Joanne McCaughan

CALL TO ORDER

Peter DeVries, Council Chair, called the meeting to order at 10 a.m. Peter welcomed everyone. Introductions were made.

REVIEW AND APPROVE AGENDA

The agenda was reviewed and approved as written.

PUBLIC COMMENT ON ITEMS NOT COVERED BY THE AGENDA

None received.

FINDINGS OF JOINT ADMINISTRATIVE RULES REVIEW COMMITTEE (JARRC)

Tim recapped steps the Council went through in adopting WAC 51-11, the Washington State Energy Code (WSEC), as follows.

Public hearings were held on September 29, 2009 in Renton and on October 5, 2009 in Spokane to receive public testimony about adoption of the 2009 code and proposed code changes.

On October 1, 2009 the JARRC held a hearing on the proposed rule that was the basis of those public hearings. Kristyn Clayton and Tim testified at the JARRC hearing. JARRC moved to request the Council to provide additional information about the small business economic impact statement, specifically addressing job impacts, cost analysis and cost benefit analysis. Written notice of the JARRC motion was received by the Council on October 14, 2009.

The Council held a special meeting of its Economic and Regulatory Assessment Committee on October 23, 2009 and a work session on October 29, 2009. On November 10, 2009, the Council received further written notice from the JARRC, reminding it that the information had been requested prior to WSEC adoption.

The Council held its regularly scheduled adoption hearing on November 12, 2009. At that meeting, WSEC adoption was postponed to November 20, 2009. On November 19, the Council sent written response to the JARRC request, notifying JARRC that:

- WSEC adoption had been delayed.
- The Council had considered cost impacts outlined in the small business economic impact statement that was filed with the proposed rule. Those costs were considered to be a reasonable estimate of the cumulative cost.
- The Council was also considering information submitted through the public hearing process about WSEC cost impacts during the adoption process.

On November 20, 2009, the Council adopted the 2009 WSEC with amendments. The Council notified the JARRC of this action in a November 25 letter, with cost benefit analysis attachments from the Department of Commerce and the Northwest Energy Efficiency Alliance.

Another public hearing was held by the JARRC on December 2, 2009, at which they reviewed the adequacy of the information provided by the Council, including the timeline and adoption process. Several people submitted testimony at that hearing. By unanimous vote (5 aye, 0 nay, 2 abstention or absence), the JARRC voted on December 2 that the Council failed to revise the small business economic impact statement to include job impacts, more rigorous cost analysis and cost benefit analysis.

The JARRC chose to implement all remedies allowed it by statute, including:

- A letter to the Governor, recommending that the rule adopted by the Council be suspended, based on the Council's failure to adequately respond to its request.
- A letter to Senator Rockefeller, Chair of the Senate Environment, Water and Energy Committee and Representative McCoy, Chair of the House Technology, Energy and Communications Committee, informing them of JARRC's objections and intention to file legislation in 2010 to suspend the rule adopted by the Council.
- A notice of objection filed with the Code Reviser, for publication in the State Register.

Peter asked if the Council has received any written comment from any member of the Legislature or the Governor in response to the JARRC's December 9 letter. Tim said an e-mail response was received from Representative McCoy. He said Council members should have received a copy of that e-mail. What Representative McCoy basically said was that he would not support the legislation filed by the JARRC in 2010. He encouraged the Council to move forward with energy code changes. In response to Peter, Tim said no other legislator sent comments to the Council.

Sandra Adix said no response has been made by the Governor's Office thus far. The Governor has 30 days to respond to the JARRC notice requesting suspension of the rule. The JARRC notice was dated December 9, so that's the beginning of her 30 days. The notice to the Governor asked her to suspend the rule until the economic impact and cost benefit analyses are completed and considered by the Legislature.

The notice of objection to the Code Reviser will be filed with the rule. It will also be filed in the Washington Administrative Code (WAC) when the rule is published.

The letter to the two legislative standing committees was primarily informative about potential legislation that will delay implementation of the rule, until the standing committees receive and consider the analysis that was requested by the JARRC.

Angie said she's unclear about what is being challenged by the JARRC. She asked Sandra to further explain their intent. Sandra answered that it appears that the JARRC was not satisfied with the information that the Council provided regarding the economic impact and jobs analysis in the rulemaking process. It's unclear whether that dissatisfaction was from disagreement with the data, misunderstanding or because JARRC felt it was incomplete. The JARRC concluded that the information provided by the Council didn't satisfy its requirements for rigorous cost benefit analysis and jobs impact analysis. Angie said the challenge then is "whether it is or whether it is not." Sandra agreed that's a fair assessment.

Angie asked Tim to expand on Representative McCoy's comments. Tim said his comments were that he would not support the JARRC introducing legislation in 2010 to suspend the rule. Peter amplified that the JARRC doesn't feel they have sufficient data to determine the increased construction cost of homes or the impact on job loss or gain. He said the first question can be answered by an impartial builder comparing the 2006 and 2009 codes. However the second question is almost impossible to answer, because the same installers do the work under the 2006 and 2009 codes.

In response to Angie's question, Representative Timm Ormsby said he attended the December 2 JARRC hearing. He said the JARRC is very much concerned about the process of rulemaking. Recognizing that it's not a policy committee, the JARRC wants to make sure the right kind of information was available to the Council to ensure an informed decision was made when the Council adopted the rule. Representative Bruce Dammeier agreed. He said, rather than being concerned about the content of the outcome, the JARRC is concerned about the process by which the outcome was derived. If the Council had gone on record with what it believed to be the true costs, Bruce doesn't think the Council would be under such scrutiny by the JARRC.

Angie raised the point that a more important question for the JARRC may be, "What is the cost of not moving forward?" That question guided her decisions, as well as "a wealth of well-founded knowledge." Timm noted his interpretation is that JARRC did not hear that in exchanged correspondence. Tim said the statement in the Council letter to the JARRC based on its motion at the November 12 meeting was not clearly stated: "The Council believes the estimate provided on the small business economic impact statement that was filed on August 19 represents a reasonable estimate of cumulative costs." He said that statement to the JARRC included information on how the cost data was obtained.

Tien asked if it's the job of the Council to create jobs. Tim said the request is based on the Regulatory Fairness Act, which requires an estimate of the number of jobs created or lost. He

said all agencies have to comply with that requirement. Peter noted that the number of jobs created or lost is a very elusive figure that's basically guesswork.

Dale Wentworth said not allowing the revised WAC 51-11 to move forward is a disservice to Washington citizens. It will result in the loss of millions of dollars to train workers about new methods. He said currently in the Seattle area, homes in a 70-square-block area are being retrofitted.

Bruce said the JARRC is trying to enforce the law, which requires a reasonable estimate of job creation or loss. He said as long as the Council documents the process by which it reached its decision, he thinks the JARRC's concerns are satisfied. The JARRC is looking at what formed the basis for the Council's decision. In addition, it wants the information available to the public, so the public "can have confidence that the rule was made by reasonable people, making reasonable assessments of the information before them."

Peter disagreed with Bruce, saying the Council can't predict the rule will create X number of jobs. He said cost estimates are available and were given to the JARRC. Because estimates of jobs created or lost would not be an accurate number, Peter said he wouldn't want to sign his name on such documents. Bruce agreed that job estimates are challenging. But he said it is a statutory requirement, which other agencies have satisfied. The process is not rigorous and scientific in all cases. He said no one will dispute estimates in retrospect.

Unlike Bruce, Timm said he's not sure what JARRC would have considered satisfactory. He asked Sandra for confirmation that the small business economic impact statement (SBEIS) is part of the regular rulemaking process. Sandra answered yes. Bruce then asked if a request for a cost benefit analysis may be made but is not statutorily required. Sandra answered yes to that question also. Tim said the request for the cost benefit analysis was made in the October 14 JARRC letter, based on the motion made at the October 2 JARRC meeting. The Code Reviser has the form for the SBEIS on the CR-102 form. In some cases, an agency may determine that a SBEIS isn't necessary, based on their analysis, and simply check a box to that effect.

Tim added that it is a requirement of the Regulatory Fairness Act to estimate jobs. He said information was provided on the SBEIS that was filed, indicating job impact was unknown. Subsequent to the JARRC request for more detailed information about jobs, the Council worked with the Governor's Office and the Office of Finance Management's forecasting staff to look at the proposed rule and economic forecasts and to estimate jobs. The result of that process was that "job impacts would be so small compared to total construction employment as to be

indiscernible from economic variability and volatility, especially in a recession.” Those indiscernible findings supported the originally filed SBEIS.

Angie said it’s a critical fact that a review was conducted and resulted in an indiscernible impact. In response to Bruce’s previous comment that the intent is not to challenge the estimate, Angie said that is very much a risk. The Council may be audited to determine whether grant monies actually provide the number of jobs predicted. Estimating a number is not only challenging, but also somewhat libelous and risky. Angie said listing the impact as indiscernible is a response. Peter agreed that guessing at numbers is irresponsible. John Cochran agreed with Angie and Peter. He thinks it’s obvious that the Council followed the process. Multiple TAG meetings were held, as well as multiple public hearings, special workshops and special Council meetings.

John Chelminiak also agreed with Angie and Peter. He said it’s impossible to say “this regulation does X, and this regulation does Y.” Taken as a whole, testimony received by the Council is that the rule is “essentially jobs neutral or, frankly, jobs positive.” The number of jobs, however, is unknown. John noted that doesn’t mean that jobs in small businesses won’t be lost. They will be replaced by other jobs in other businesses, in all likelihood. The Council received testimony that the rule may reduce the number of homes built. It’s questionable whether that will or will not occur. However there’s no question that over time the rule will positively impact homeowners by saving them money.

Don Jordan, who is a contractor performing work required by the new rule, said he agrees with John Chelminiak that the impact on jobs is neutral. For his company, however, the rule is jobs positive. Some jobs performed in the field, such as adding additional loose fill and air sealing, add man hours to each project. Others such as increasing R values and blanket insulation, are performed at the manufacturers’ level.

Tien agreed with the impossible complexity of estimating jobs lost or gained. Angie said the Council and TAG members represent a vast portion of the building industry. Each rule isn’t viewed independently, but how, as a whole, they impact the citizens of Washington State. Angie said she believes the WSEC, in the end, creates jobs. She said, “If we don’t as a nation get on board with this, we are going to lose jobs to other nations that are stepping up to the plate, for industry and for production...” Angie said the Council has done a very good job of looking at the pros and cons in every area. Peter agreed with Angie, noting the endless TAG hours spent reviewing code changes. He said he very strongly agrees that the revised WAC 51-11 is jobs neutral.

Jerry Mueller, representing the general public, said he has read and evaluated every CR-102. He thinks the Council has a pretty good, general overall idea of cost effectiveness. He can appreciate savings which homeowners will realize with the revised WAC. He thinks the Council did a good job of evaluating and reaching a decision, based on a wealth of information.

Bruce encouraged the Council to acknowledge the reality that the bipartisan JARRC, whose job it is to review the Council's process, found the process lacking. He said that should cause the Council to closely examine its process. Timm said one of the unfortunate dynamics surrounding the JARRC review was its late entry into the process. Consequently, there was little reaction time. Bad timing also prevented Bruce and Timm from testifying before the JARRC about all the Council work, as noted today.

Sandra said she appreciates comments from Representatives Dammeier and Ormsby. Her observation is that the SBEIS that was filed with the rule reflected a large amount of information and testimony that the Council received in its rulemaking process. Noting the rulemaking process of the Council is unusually complex, she said, "Unless someone is involved in the committee's process every step of the way, or unless someone goes on to the Building Code Council's website, looks at the multiple pages of meeting minutes from multiple committee and TAG meetings, you know there's probably no way of understanding all of the steps that lead up to and are reflected in the SBEIS that was filed. Unfortunately there's no way to easily synopsise and spoon feed, as it were, the information on a Building Code Council rulemaking process." She said that's an inherent problem of the Council's rulemaking process.

Sandra said she appreciates Bruce's comment that process was a real concern of the JARRC. She said while she thinks it's abundantly clear that JARRC's concern was process, it's also clear that process was followed. She said she's not quite sure how to best communicate that.

Angie thanked Sandra for her comments. She said adoption of WAC 51-11 was a very complex issue. Rebutting Bruce's earlier comment, Angie said the December 2 JARRC meeting had two absent or abstaining members. The decision to object to the Council's rulemaking process was made a very small group of people who had a short amount of time to reach that decision. Angie asked what the Council wants to do now, to go back and try to recreate a job estimate, thereby further stalling the process, or to move forward into a legal challenge.

Tim noted that the information provided to the JARRC could have been more clear and better organized. He recommended that the Council respond back to the JARRC and the policy committees that the JARRC corresponded with, providing the following information:

- A very concise summary of what the SBEIS contains.

- A summary of work done and discussions held about job impacts.
- The Council's decision about cost analysis, background information it was based on and cost benefit analysis.

Tim noted those are the topics that the JARRC expressed concern about. He said it's important that the Council respond back, to try to clarify.

Angie asked Tim the difference between responding to JARRC with (1) clarification of how the Council followed the process and reached its decision to adopt the rule and (2) another report that may not answer JARRC's concerns. Tim answered first that action by the JAARC is complete. Filing an additional report won't change its objection to the Council rulemaking process.

In terms of the rulemaking process, Tim said the Council adopted amendments to WAC 51-11, the WSEC. The proposed rule was filed on September 2. Council staff is presently in the process of filing the permanent rule with amendments adopted by the Council. That filing should be complete by mid-January. The effective date of the permanent rule, barring action by the Legislature or the Governor, is July 1, 2010.

Voicing his disagreement with the JARRC's objection, Peter asked if it would help the Council's position to provide the JARRC with a chronology of all events, reiterating all information received by the Council. He thinks the Council should move forward and not postpone enactment of the rule until 2011. Peter doubts that better information will become available in the future. Having served on the Council for six years, he said the work done on this rule is "one of the most well put together...by people with expertise from various jobs, various responsibilities, various professions." Timm suggested that it's appropriate, and expected, that the Council provide such a chronology. He added that each Council member has the ability to express his/her confidence or lack thereof, or any opinion about his/her direct involvement, in the rulemaking process that the Council followed in adopting WAC 51-11.

Angie asked if individual Council members contacting the JARRC would do any good. Tim said it would go on the record as opposing legislation filed by the JARRC in 2010. John Cochran asked who to direct such correspondence to. Tim said it should be sent it to the policy committees at the Legislature, to address legislation that will be proposed by the JARRC to suspend the rule.

Sandra said the letter from the JARRC to the chairs of the policy committees stated that the JARRC would introduce legislation to delay implementation of the rule until those committees have received and reviewed the information requested by the JARRC. She said two options are that the policy committees may be satisfied with the submittal of additional information, as

previously discussed, or that the policy committees may define what additional information they wish to see. Peter asked if Sandra is suggesting that a response should go to the policy committees rather than the JARRC. Sandra said yes, respond to the policy committees, because the JARRC's action is done.

John Chelminiak, Chair of the Council's Legislative Committee, said he agrees with Sandra that the next step is passing the information on to the Governor and the Legislature. He suggested packaging the information, whether in a letter or a statement, to include data upon which discussions were based, particularly about job creation. He said if that information doesn't satisfy the policy committees, the Council may have to hire an economist. Based on his work with the Puget Sound Economic Development District concerning clean technology, John believes the rule is "at worst job neutral, and at best will have a positive increase in jobs."

Angie suggested that a letter from the Council as a whole, rather than individual letters from Council members, would have more meaning. Sandra suggested that Tim could draft a written response with the SBEIS, job impacts, cost analysis and cost benefit analysis information. Then a public hearing could be held at which that response is discussed. The public can attend the meeting and participate. Their participation wouldn't be testimony, per se, because what is discussed will be the Council's rulemaking process, what actions were taken, what they were based on, etc. Peter agreed. He said Tim will basically draft a synopsis of Council actions and the reasons for them. He suggested holding another Council conference call after Tim drafts the response.

Tim said the first meeting on the proposed Council 2010 Meeting Schedule is January 8. That's the first Monday before session begins on January 11. Tim suggested that the response can be discussed more at that meeting. Angie suggested that Tim and each Council member draft a summary of the steps the Council took in its rulemaking process, so those drafts can be compared at that January Council meeting. She asked Tim to prepare a template that members can use. Peter asked the location of the meeting. Tim said the first meeting of each year is generally scheduled in a legislative hearing room in Olympia. Peter asked Tim to prepare a draft and e-mail it to members, which members can then return with their comments, before the January meeting.

Motion #1:

John Cochran moved that the Council request staff to draft a chronology of Council actions about WAC 51-11 and the data those decisions were based upon. Angie Homola and Jerry Mueller both seconded the motion.

John Chelminiak said a similar process is used by the Bellevue City Council for very difficult issues. He recommended that comments/edits be made to Tim only, so the Open Public Meetings Act isn't violated. Sandra agreed. Sensing that Council sentiment isn't unanimous, John encouraged members who don't agree with the majority to also participate. Angie said she appreciates John's comments. She asked for clarification of what can and cannot be submitted into the record. Her understanding is that the public comment period is closed. Sandra said she will address this after the vote. John Chelminiak said his comments were for Council members, not for the outside public, to present testimony.

The question was called for on Motion #1. The motion was unanimously adopted.

Sandra offered the following recommendations about how the Council may proceed:

- Comments or suggested revisions to Tim's draft should be e-mailed solely to Tim.
- Tim will assemble everyone's comments into the meeting packet for the January 8 meeting, which will be available to the public.
- If members receive any constituent correspondence on this issue, that correspondence should be forwarded to Tim, so it can also be included in the meeting packet.

Angie asked if Council members can hold private conversations among themselves about this issue. Sandra said while Council members can talk to each other, the Open Public Meetings Act requires that discussion on this issue be done in open session. She said, "You must be very careful to avoid even the appearance of what they call a 'rolling quorum,' where one person talks to another person and then that person talks to somebody else. It's like a game of telephone. And pretty soon everyone has talked to each other in a serial fashion. And that's not in keeping with the spirit or the letter of the Open Public Meetings Act." Given the sensitivity of the issue, Sandra recommended that members are much better served simply attending the January 8 meeting and sharing comments in open session.

Bruce commented that a more important point than how the Council can get out of this situation is how to do things differently in the future to avoid repeating this situation. Peter agreed with that positive statement.

Timm complimented Council members and staff for the time and effort all expended in the very technical process of developing new codes. He noted the Council is a very small agency. Despite the unanticipated objection by JARRC arising during the latter part of the process,

everyone has responded well. Peter thanked Timm and other legislators for serving as ex officio Council members. He said their time and efforts are much appreciated.

Angie thanked everyone for their suggestions. She suggested that thought be given to hiring a consultant for merging the WSEC with the International Energy Conservation Code.

OTHER BUSINESS

2010 Meeting Schedule

Tim said six Council meeting are proposed for 2010, on January 8, March 12, June 11, September 10, October 15 and November 19. The proposed start time for those meetings is 10 a.m. In addition, conference call meetings of the Legislative Committee will be held each week during legislative session, on Thursdays at 3 p.m.

Angie suggested moving the meeting start times to 9:30 a.m. instead of 10 a.m. Peter agreed that would work better for him. Both Angie and Peter said they would defer to the majority wish. Tim said 10 a.m. works better for staff and the majority of Council members.

Motion #2:

John Cochran moved to adopt the proposed 2010 Meeting Schedule. Ray Allshouse seconded the motion. The motion was unanimously adopted.

Council Move

Tim said it was suggested in a Department of Commerce report that the Council move to the Department of Labor and Industries (L&I). He met with L&I staff this past week, having a good discussion with them about how the Council would fit with them organizationally and physically. Tim said he wants to explore other options, such as being housed with Architecture and Engineering Services at the Department of General Administration.

Tim also met with the Director of the Department of Commerce yesterday. Commerce is taking a neutral position on the location of the Council, despite proposed legislation from the Governor's Office. The possibility exists that the Council may stay with Commerce.

Tim is working with constituent groups and lobbyists to determine the best option. Promising to keep the Council informed, he encouraged comments from any interested members.

Ray Allshouse asked Tim if Commerce is “flip-flopping” on the issue. Tim said it was described to him as a “recommendation,” that could go either way through the legislative process.

ADJOURNMENT

Lacking further business, Peter adjourned the meeting at 11:25 a.m.